84-902

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WARDAIR CANADA INC.,
Appellant,

v.

STATE OF FLORIDA,
DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

This case presents only a minor factual variation of the question decided in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), but with an adverse repercussion potential at least as serious if the Florida Supreme Court decision being appealed is not reversed. The question presented by this appeal is:

Whether the imposition by Florida of an unapportioned fuel tax on an instrument of foreign commerce, aviation fuel, pumped from Florida based storage facilities into the aircraft of a foreign national for use as a propellant of such aircraft which are owned, based and registered abroad, and operated exclusively in international commerce is in violation of:

1. the Commerce Clause of the Constitution of the United States, Article I, Section 8, Clause 3,

2. the Supremacy Clause of the Constitution of the United States, Article VI, Clause 2, and

3. the Nonscheduled Air Services Agreement between the Government of the United States of America and the Government of Canada, TIAS 7826, 25 UST 787 (May 8, 1974).

PARTIES

The parties are those named in the caption.*

Pursuant to Supreme Court Rule 28.1, Appellant sets forth its parent company, and subsidiary (except its wholly owned subsidiary) and affiliate corporations, as follows: Wardair International Ltd. (the parent company), International Vacations Ltd., Wardair Leasing Inc., Wardair Equipment Ltd., Wardair Hawaii Limited, Wardair (U.K.) Ltd., Wardair Holidays (Deutschland) GmbH, and Wardair (France) S.A.R.L.

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*There are many domestic and foreign air carriers that challenged the imposition of the state tax on aviation fuel used in interstate or foreign commerce on Constitutional and other grounds in other cases. The Florida Second Circuit Court in and for Leon County, Florida, had consolidated with Appellant's case, a complaint filed by Air Jamaica, a Jamaican air carrier, and 11 other foreign airlines, but the Florida Second Circuit Court issued its final judgment and opinion as to Appellant's action separate from the others. The separate Florida Second Circuit Court judgments and opinions involving Appellant, and the others were appealed separately. The Florida Supreme Court upheld the validity of Senate Bill 8A, Chapter 83-3, Laws of Florida, except as to the corporate tax credits to Florida based airlines in all of the cases certified to the Florida Supreme Court by the Florida First District Court of Appeal. Besides the opinions cited in footnote 1, *infra*, the other Florida Supreme Court opinions that ruled on the validity of the fuel tax imposed by Florida Senate Bill 8A on aviation fuel pumped from Florida storage facilities for use by U.S. and foreign air carriers in air commerce are as follows: *Eastern Air Lines, Inc.* v. *Department of Revenue*, So.2d (Fla. 1984); *Department of Revenue* v. *Lineas Aereas Costarricenses, S.A. et al.*, So.2d (Fla. 1984); *Department of Revenue* v. *Air Jamaica, Ltd., et al.*, So.2d (Fla. 1984); and *Northeastern International Airways, Inc., et al.* v. *Department of Revenue*, So.2d (Fla. 1984).

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On Appeal from the Supreme Court of Florida

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Florida Supreme Court is not yet reported, but is printed in Appendix A, p.A-1.[1] The final judgment and opinion of the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, the

[1] The Supreme Court decision cites two Florida court decisions both involving the Florida fuel tax at issue in this case. One is an opinion of the Florida Supreme Court, *Delta Airlines, Inc., et al.* v. *Department of Revenue*, not yet reported, and the final judgment and opinion of the Second Circuit Court in and for Leon County, Florida, *Lineas Aereas Costarricenses, S.A. et al.* v. *State of Florida, Department of Revenue*, not yet reported. Both cases are printed in Appendix B, p. A-8, and Appendix D, p. A-25, respectively.

Florida Court in which Appellant filed its complaint that instituted this proceeding, is not reported, but is printed in Appendix C, p. A-21.

JURISDICTION

This suit originally commenced through an action by Appellant against Appellee seeking a permanent injunction against Appellee from the assessment and collection of fuel taxes pursuant to Senate Bill 8A, Chapter 83-3, Laws of Florida (hereinafter referred to as "Florida Senate Bill 8A"), on aviation fuel pumped from Florida based storage facilities to be used exclusively as a fuel to perform foreign air transportation services in foreign commerce by a foreign national, Appellant. The basis of Appellant's suit was that the imposition of such a fuel tax violates the Constitution of the United States and the Nonscheduled Air Services Bilateral Agreement between Canada and the United States entered into on May 8, 1974, TIAS 7826, 25 UST 787, an international bilateral agreement entered into by the Federal Government with Canada pursuant to the powers granted to the Federal Government by the Constitution of the United States.

The opinion and judgment of the Florida Supreme Court was rendered June 14, 1984, holding that Florida Senate Bill 8A as it pertained to Appellant did not violate the Constitution of the United States and that Appellant is not entitled to an exemption from the Florida fuel tax. Appellant's motion for a rehearing was filed timely on June 28, 1984, and was denied by the Florida Supreme Court on September 12, 1984. Appendix E, p. A-37. The Notice of Appeal was served November 13, 1984, and filed in the Florida Supreme Court on November 15, 1984. Appendix F, p. A-39. The time within which to docket this appeal in this Court expires with December 11, 1984. The

jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(2). Decisions sustaining jurisdiction of this Court to review the decision on direct appeal are: *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 440–441, (1979); *Cohen* v. *California*, 403 U.S. 15, 17–18 (1971); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 61, n.3 (1963); and *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921).

If this Court does not consider this appeal to be the proper mode of review, Appellant respectfully requests that this appeal be acted upon as a petition for a writ of *certiorari* pursuant to 28 U.S.C. sec. 2103.

CONSTITUTIONAL, STATUTORY, AND INTERNATIONAL AIR TRANSPORT AGREEMENT PROVISIONS INVOLVED

This case raises questions concerning the validity of certain provisions of Senate Bill 8A, Chapter 83-3, Laws of Florida, under the Commerce and Supremacy Clauses of the United States Constitution, Article I, Section 8, Cl. 3 and Article VI, Cl. 2, respectively, and the Nonscheduled Air Services Agreement between the United States and Canada of May 8, 1974, TIAS 7826, 25 UST 787.

The applicable provisions of The Constitution of the United States of America are:

> "Congress shall have Power . . . To regulate Commerce with foreign Nations. . . ." U.S. Const. Art. I, sec. 8, cl. 3.
>
> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme

Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2.

Relevant provisions of Florida Senate Bill 8A, are presented in Appendix G, p. A-42.

Relevant provisions of the Nonscheduled Air Services Agreement between the United States and Canada are printed in Appendix H, p. A-48.

Convention on International Civil Aviation (The Chicago Convention), 61 Stat. 1180, TIAS 1591 (signed Dec. 7, 1944, ratified by U.S. Aug. 9, 1946, effective April 4, 1947), Article 24(a):

"Aircraft on a flight to, from, or across the territory of another contracting State shall be admitted temporarily free of duty, subject to the customs regulations of the State. Fuel, lubricating oils, spare parts, regular equipment and aircraft stores on board an aircraft of a contracting State, on arrival in the territory of another contracting State and retained on board on leaving the territory of that State shall be exempt from customs duty, inspection fees or similar national or local duties and charges. . . ."

Relevant sections of the Federal Aeronautics Act of 1958, as amended, 49 U.S.C. sec. 1301, *et seq.* are as follows:

Section 402, 49 U.S.C. sec. 1372:

"(a) No foreign air carrier shall engage in foreign air transportation unless there is in force a permit issued by the Board authorizing such carrier so to engage.

* * *

"(e) The Board may prescribe the duration of any permit and may attach to such permit such reasonable terms, conditions, or limitations as, in its judgment the public interest may require."

Section 801, 49 U.S.C. sec. 1461:

"(a) The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in . . . any permit issuable to any foreign air carrier under section 402 of this Act, shall be presented to the President for review. The President shall have the right to disapprove any such Board action concerning such . . . permits solely upon the basis of foreign relations or national defense considerations which are within the President's jurisdiction. . . ."

Section 802, 49 U.S.C. sec. 1462:

"The Secretary of State shall advise the Secretary of Transportation, the Board, and the Secretary of Commerce, and consult with the Secretary of Transportation, Board, or Secretary of Commerce, as appropriate, concerning the negotiations of any agreement with foreign governments for the establishment or development of air navigation, including air routes and services."

Section 1102, 49 U.S.C. sec. 1502:

"(a) In exercising and performing their powers and duties under this chapter, the Board and the Secretary of Transportation shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries. . . .

"(b) In formulating United States international air transportation policy, the Congress intends that the Secretary of State, the Secretary of Transportation, and the Civil Aeronautics Board shall develop a negotiating policy which emphasizes the greatest degree of competition that is compatible with a well-functioning international air transportation system. This includes, among other things:

(1) the strengthening of the competitive position of United States air carriers to at least assure equality with foreign air carriers, including the attainment of opportunities for United States air carriers to maintain and increase their profitability, in foreign air transportation;

(2) freedom of air carriers and foreign air carriers to offer fares and rates which correspond with consumer demand;

(3) the fewest possible restrictions on charter air transportation;

(4) the maximum degree of multiple and permissive international authority for United States air carriers so that they will be able to respond quickly to shifts in market demand;

(5) the elimination of operational and marketing restrictions to the greatest extent possible;

(6) the integration of domestic and international air transportation;

(7) an increase in the number of nonstop United States gateway cities;

(8) opportunities for carriers of foreign countries to increase their access to United States points if exchanged for benefits of similar magnitude for United States carriers or the traveling public with permanent linkage between rights granted and rights given away;

(9) the elimination of discrimination and unfair competitive practices faced by United States airlines in foreign air transportation, including excessive landing and user fees, unreasonable ground handling requirements, undue restrictions on operations, prohibitions against change of gauge, and similar restrictive practices; and

(10) the promotion, encouragement, and development of civil aeronautics and a viable, privately owned United States air transport industry.

"(c) To assist in developing and implementing such an international aviation negotiating policy, the Secretaries of State and Transportation and the Civil Aeronautics Board shall consult, to the maximum extent practicable, with the Secretary of Commerce, the Secretary of Defense, airport operators, scheduled air carriers, charter air carriers, airline labor, consumer interest groups, travel agents and tour organizers, and other groups, institutions, and government agencies affected by international aviation policy concerning both broad policy goals and individual negotiations.

"(d) The President shall grant to at least one representative of each House of Congress the privilege to attend international aviation negotiations as an observer if such privilege is requested in advance in writing."

STATEMENT OF THE CASE

Statement of Facts

Appellant,[2] is a corporation established and existing under the laws of Canada with its principal offices and base of operation located in Canada. It is engaged in international charter air transportation services as a common carrier of passengers and property. Its international services originate largely out of Canada to destinations in Europe, the Carribbean, Mexico and the United States.

In order to perform charter services to and from the United States, Appellant applied to the Civil Aeronautics

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[2] In the preceedings below, Appellant was identified under its prior name, Wardair Canada (1975), Ltd. Subsequent to Appellant's initial action below, it changed its corporate name to its present one, Wardair Canada Inc., and that corporate name change was approved by the Civil Aeronautics Board, CAB Order 83-12-54 (Dec. 9, 1983).

Board for a foreign air carrier permit pursuant to section 402 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1372, which the CAB granted.[3] Under its CAB issued permit (Appendix I, p. A-73), Appellant's charter foreign air transportation service is limited to that authorized by the U.S./Canada Nonscheduled Air Services Agreement of May 8, 1974, TIAS 7826, 25 UST 787. Appendix H, p. A-48. The term of its permit also depends on the continuation of that international bilateral agreement or another subsequent international agreement between the U.S. and Canada covering the same type of air service. Appendix I, p. A-78. Pursuant to its foreign air carrier permit authority, Appellant operates round-trip charter[4] programs between Canada and the United States with many of those operations in and out of points in Florida.

The Florida legislature on or about March 3, 1983, enacted Florida Senate Bill 8A. Appendix G, p. A-42. It was signed into law by the Florida governor effective April 1, 1983. Florida Senate Bill 8A imposes a 5 percent fuel tax, denominated by the Florida Department of Revenue as an excise tax, on all aviation fuel drawn from Florida storage facilities based on a calculated, not an

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[3] CAB Order 80-8-97 (July 18, 1980), and the foreign air carrier permit issued to Appellant pursuant to that Board order are printed in Appendix I, p. A-68.

[4] While the U.S./Canada bilateral agreement is identified as the Nonscheduled Air Services Agreement between the United States and Canada, Annex B to that agreement defines nonscheduled air service as charter air service permitted under the terms of the agreement. Appendix H, p. A-64.

actual price per gallon.[5] All aviation fuel purchased in Florida by airlines is fully taxed regardless of whether it is used in intrastate, interstate, or in foreign commerce. There is no apportioning.[6] All aviation fuel purchased by Appellant from Florida storage facilities is used exclusively in foreign commerce as an energy source to propel its aircraft used in its foreign charter air transport operations pursuant to the foreign air carrier permit issued to Appellant by the Civil Aeronautics Board.

Concern as to a possible aviation fuel tax to be imposed by Florida on foreign nationals operating services in foreign air commerce was expressed by the United States Department of State in a letter to the Florida Department of Revenue, dated September 29, 1982. Appendix J, p. A-82. The U.S. State Department advised the Florida Department of Revenue of the "generally-accepted and long-standing international practice of recriprocally exempting [aviation fuel] from taxes". It stated that "The United States obligation to accord these exemptions stems from our adherence to Article 24 of the International Convention on Civil Aviation (Chicago, 1944) and to the air transport agreements which the United States has

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[5] Revenues generated by the imposition of this Florida fuel tax are to be utilized by Florida's Department of Transportation for the purposes set forth in Florida Statute 339.08. Under that provision such tax revenues are to be utilized in areas wholly unrelated to air transportation, such as the contruction and maintenance of state roads.

[6] The failure to provide for reasonable apportioning of the tax, and to be fairly related to the services provided foreign airlines like Appellant makes this tax unconstitutional based on the tests in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977).

with over 70 foreign countries." The State Department concluded that: "A proliferation of state and local taxes would frustrate the international system of recriprocal tax exemptions". The Florida Department of Revenue responded stating that "Florida recognized the importance of foreign airlines . . . many years ago, and . . . the generous tax advantages allowed them have not changed." Appendix K, p. A-85. After Florida Senate Bill 8A was enacted, the U.S. State Department wrote another letter (Appendix L, p. A-87) to the Florida Department of Revenue expressing "concern regarding the recent enactment of a state tax on aviation fuel", and observing that:

> "If imposed, this tax will cause serious foreign relations problems unless provision is made to exclude foreign airlines."

Shortly after Florida Senate Bill 8A became law, Appellant filed its complaint in court challenging the constitutionality of the law insofar as it authorizes the assessment and collection of fuel taxes from Appellant.

The Proceedings Below

This case originated through a complaint, as amended, by Appellant filed in the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida (hereinafter referred to as the "Florida Second Circuit Court"), challenging the constitutionality of Florida Senate Bill 8A insofar as it imposed and required a collection of a fuel tax on aviation fuel pumped into Appellant's aircraft to be used solely as a propellant of such aircraft which are used exclusively in international air commerce. The grounds for Appellant's challenge of the Florida legislation was that it violates the Commerce and Supremacy clauses of

the United States Constitution, and the Nonscheduled Air Services Agreement between the United States and Canada, TIAS 7826, 25 UST 787 (May 8, 1974).[7]

The Florida Second Circuit Court held that the challenged Florida legislation did not violate the United States Constitution, but that it is inconsistent with the U.S./Canada Nonscheduled Air Services Agreement, and on that basis granted Appellant a permanent injunction from the assessment and collection of fuel taxes by Appellee. *Wardair Canada (1975), Ltd.* v. *State of Florida, Department of Revenue*, Fla. Supp. (Fla. 2d Cir. 1983). Appendix C, p. A-21.

Appellee appealed the final judgment of the Florida Second Circuit Court to Florida's First District Court of Appeal, and Appellant filed a cross-appeal again squarely challenging the constitutionality of the Florida legislation. The First District Court certified the case to the Florida Supreme Court. All during the proceeding before the Florida Supreme Court, Appellant took the position that the Florida legislation insofar as it required Appellant to pay a fuel tax is unconstitutional, violating the Commerce and Supremacy Clauses, and that it is inconsistent with the U.S./Canada Nonscheduled Air Services Agreement. On June 14, 1984, the Florida Supreme Court filed its decision on these issues (rehearing denied on September 12, 1984) affirming that part of the decision of the Florida Second Circuit Court holding that Florida

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[7] Appellant and Appellee stipulated that, pending a final decision of this case, Appellant is permitted to self accrue the fuel tax imposed by Florida Senate Bill 8A. The funds so accrued are maintained in a segregated escrow account. As of now Appellant's escrow account created by it pursuant to said stipulation contains over $117,000.00.

Senate Bill 8A is constitutional,[8] but reversed the lower court's holding that the U.S./Canada Nonscheduled Air Services Agreement exempts Appellant from the payment of fuel taxes pursuant to Florida Senate Bill 8A. *Department of Revenue* v. *Wardair Canada, Ltd.*, So. 2d (Fla. S. Ct. 1984). Appendix A, p. A-1.

THE QUESTION PRESENTED IS SUBSTANTIAL

The Supreme Court of Florida has decided a Federal Constitutional question of substance in a way not in accord with applicable decisions of this Court, the U.S. Constitution and Federal Government policy involving foreign air commerce.

The Supreme Court of Florida missed the very essence of the cases on which it heavily relied: *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), and *Hines* v. *Davidowitz*, 312 U.S. 52 (1941). The position taken by the Florida Supreme Court in its decision is virtually identical to the position taken by the Appellees in *Japan Line* v. *County of Los Angeles*. This Court summarized that position and then repudiated it in *Japan Line* as follows:

> "The premise of appellees' argument is that a State is free to impose demonstrable burdens on commerce, so long as Congress has not preempted the field by affirmative regulation. But it long has been 'accepted constitutional doctrine that the commerce clause,

[8] The Florida Supreme Court decision concluded that section 6 of Florida Senate Bill 8A violated the Commerce Clause of the U.S. Constitution by providing a corporate tax credit to Florida-based airlines, but that violation according to the Florida Supreme Court decision is severable from the remaining provisions of the bill without hampering the legislation's primary purpose. This aspect of the Florida Supreme Court decision is not a subject of this appeal.

> without the aid of Congressional legislation . . . affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.' *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769, 65 S.Ct. 1515, 1520, 89 L.Ed. 1915 (1945). Accord, *Hughes v. Oklahoma*, 441 U.S. 322, 326 and n. 2, 99 S.Ct. 1727, 1731, 60 L.Ed.2d 250 (1979); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328, 97 S.Ct. 599, 606, 50 L.Ed.2d 514 (1977). Appellees' argument, moreover, defeats, rather than supports, the cause it aims to promote. For to say that California has created a problem susceptible only of congressional—indeed, only of international—solution is to concede that the taxation of foreign-owned containers is an area where a uniform federal rule is essential. California may not tell this Nation or Japan how to run their foreign policies." *Japan Line Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 454–455 (1979).

This Court has never sanctioned a tax of the kind involved here on a foreign owned instrumentality of foreign commerce.

Appellant, a foreign national, performs foreign air transportation services subject to the strict regulation of the Federal Government.

Just as in the *Japan Line* case, the Appellant is a foreign national engaged exclusively in international commerce. Appellant here operates its common carrier air service, based in Canada, to and from the United States pursuant to operating authority granted to it by, and subject to the strict regulations of the Federal Government (the Civil Aeronautics Board, the Department of

Transportation, and the Department of State, principally).

Appellant's Canada-U.S. charter air services is authorized by the Federal Government through a foreign air carrier permit[9] (Appendix I, p. A-73) granted to Appellant by the Civil Aeronautics Board pursuant to section 402 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1372.[10] CAB Order 80-8-97 (Appendix I, p. A-68), issuing a foreign air carrier permit to Appellant, shows that said Order and permit were presented to the President of the United States pursuant to section 801(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1461(a), to determine whether the permit would be disapproved by him on the basis of "foreign

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[9] Only a "foreign air carrier" may obtain an operating permit to engage in foreign air transportation pursuant to section 402 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1372. A "foreign air carrier" is defined by section 101 (22) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1301(22), to mean "any person, not a citizen of the United States, who undertakes . . . to engage in foreign air transportation." Foreign air transportation is defined by section 101(24) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1301 (24) to mean "the carriage by aircraft of persons or property as a common carrier for compensation or hire in commerce between . . . a place in the United States and any place outside thereof. . . ." U.S. nationals generally obtain authority to operate in foreign air transportation through section 401 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1371.

[10] Effective January 1, 1985 (section 1601(b)(2) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1551(b)(2)) "The authority of the Board under this Act with respect to foreign air transportation is transferred to the Department of Transportation which shall exercise such authority in consultation with the Department of State." Section 1601(b)(1)(B) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1551(b)(1)(B).

relations or national defense considerations", and the President on August 18, 1980, notified the CAB that the President did not intend to issue a disapproval. Appellant's permit limits its Canada-U.S. service to service authorized by the Nonscheduled Air Services Agreement between the United States and Canada, TIAS 7826, 25 UST 787, (May 8, 1974). Appendix I, p. A-48.

Section 802 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1462, authorizes the Secretary of State to negotiate agreements such as the U.S./Canada Nonscheduled Air Services Agreement.[11] Section 1102(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1502 (a), requires the CAB and the Department of Transportation in administering the Federal Aviation Act to act in accordance with obligations assumed by the United States through such agreements.

Aviation fuel used by Appellant is an instrument of foreign commerce, and therefore is the subject of Federal regulation.

As in the *Japan Line* case, a state, Florida in this case, has unilaterally imposed a tax on an instrumentality of commerce, in this case aviation fuel, used exclusively for

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[11] Section 802 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1462, is virtually identical to section 802 of its predecessor aeronautics act, the Civil Aeronautics Act of 1938. The Conference Report as to section 802 of the latter act states that "This section authorizes negotiations by the State Department of agreements with foreign governments for the establishment of air routes and services between the United States and foreign countries. . . . Section 802 of the conference agreement merely requires the State Department to advise the Authority of all negotiations relating to such matters and consult with the Authority with respect to them." H. R. Rep. No. 2635 (Conf. Rep.), 75th Cong. 3d sess., 76 (June 7, 1938).

foreign commerce purposes by a foreign national, Appellant. That the aviation fuel in question is an instrumentality of foreign commerce there can be no doubt. *Japan Line* sets the test for that determination. *Japan Line Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 445–446 (1979). In *Japan Line*, this Court determined that the transport containers being taxed by California were instrumentalities of foreign commerce based on international agreements (cited in note 10 of the *Japan Line* decision) to which the United States was a party granting such containers an exemption from import duties and taxes while the containers are engaged in foreign commerce. Comparable international agreements exist to which the Federal Government is a party providing comparable tax relief as to Appellant's aviation fuel purchases used in the performance of Appellant's foreign air commerce operation.

The U.S./Canada Nonscheduled Air Services Agreement, TIAS 7826, 25 UST 787 (May 8, 1974), negotiated and executed on behalf of the U.S. by the Executive Branch of the Federal Government pursuant to section 802 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1462, in Article XII provides for an exemption from certain taxes, fees and duties, among them being import and customs duties and restrictions on fuel

> "taken on board aircraft of the carriers of one Contracting Party in the territory of the other Contracting Party and intended solely for use in international air services . . . whether or not such items are consumed wholly within the territory of the Contracting Party granting the exemption." Appendix H, p. A-58.

Article 24(a) of the Convention on International Civil Aviation (The Chicago Convention), 61 Stat. 1180, TIAS

1591, ratified by the U.S. on August 9, 1946, provides a similar exemption. See, page 4, *infra*. Both Canada and the United States are signatories to that Convention. Since the tax exemptions through international agreements for aviation fuel used by Appellant to operate its aircraft in foreign air commerce provide tax exemptions of the type granted for shipping containers involved in *Japan Line* and such exemptions were the bases in *Japan Line* for a determination that the subject transport containers were instruments of foreign commerce, then the aviation fuel used by Appellant must be construed as an instrumentality of foreign commerce and therefore the subject of Federal regulation. *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 445–446, 448 (1979). In this case Appellant is also providing a common carrier air service to and from the United States pursuant to authority issued to it by the Federal Government limited to foreign commerce as set forth in the U.S./Canada Nonscheduled Air Services Agreement. There can be no concern then that the fuel uplifted in Florida by Appellant will be used for purposes other than foreign commerce.

The Florida tax on Appellant's Florida aviation fuel uplifts violates the need for uniformity of Federal regulation in foreign commerce and is therefore unconstitutional under the Commerce Clause.

Since the subject aviation fuel is an instrumentality of foreign commerce there must be a consideration as to whether the Florida fuel tax prevents uniform regulation by the Federal Government of foreign air commerce with foreign governments. If the Florida fuel tax violates this principle it is unconstitutional and therefore invalid. *Japan Line Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 451

(1979). The Florida tax on Appellant's aviation fuel uplifted in Florida fails this test.[12]

International air commerce between this Nation and others is no *laissez-faire* field of service. Such foreign air commerce is a highly regulated, a highly structured segment of commerce strictly controlled by the Federal Government. That tight Federal control has survived and under current legislation will continue to survive the virtually complete deregulation in the domestic field of air transport. The Federal Government shapes the course of foreign air commerce through its powers over licensing, route services and other air services, rates and fares, competition, and its power to negotiate air transport agreements with foreign nations in order to move toward the realization of Federal foreign air transport goals set forth in section 1102(b) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1502(b). The ability of the Federal Government to negotiate air transport agreements of various types with foreign nations without interference by any of the individual states of this Nation is an imperative.

International air transport agreements between the U.S. and other nations exist on a complex world-wide basis. In its letters to Florida's Department of Revenue the U.S. State Department—the principle branch of the Federal Government authorized by Congress through

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[12] The Florida Second Circuit judgment, granting Appellant a permanent injunction against the Florida Department of Revenue from assessing and collecting fuel taxes from Appellant found "Senate Bill 8A inconsistent with the undertakings of United States government in international bilateral agreements designed to establish federal uniformity and prevent retaliatory taxes on U.S. carriers." Appendix C, p. A-22.

section 802 of the Federal Aviation Act to negotiate international air transport agreements—warned Florida that the imposition of its fuel tax on foreign airlines would "frustrate" the purposes of such agreements and the reciprocal arrangements that have been established by the Federal Government, and trigger retaliation through the imposition of similar taxes by foreign governments on the airlines of the United States generally. For, in foreign commerce, as observed in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 456 (1979), "Even a slight overlapping of tax—a problem that might be deemed *de minimis* in a domestic context—assumes importance when sensitive matters of foreign relations and national sovereignty are concerned."

If other states of the U.S. adopt a similar tax on aviation fuel used in foreign air commerce by foreign airlines—a highly probable prospect if Florida's fuel tax is found valid—the intrusion by U.S. states in this field and the inevitable retaliatory responses by foreign nations to such taxation will further erode the ability of the Federal Government to achieve viable working relationships with other nations so necessary to foster a sound and effective international air transport system. The power of the Federal Government to achieve Federal goals in foreign air commerce would be seriously weakened. The ability of the Federal Government to fulfill its obligations under international air transport agreements and reciprocal arrangements it enters into with other Nations would be substantially impaired. The inevitability of this sequence of events was the basis for this Court to hold that a tax on an instrumentality of foreign commerce by a state is unconstitutional. *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 450–454 (1979). The same conclusion is as applicable to the state tax involved in this case: it

violates the Commerce Clause of the United States Consitution.

Florida has no power to impose a tax affecting the policies of the Federal Government in foreign commerce and foreign relations, and it is therefore unconstitutional under the Supremacy Clause.

Florida with its tax on fuel uplifted by foreign nationals in Florida for use in foreign commerce has intruded in an area, foreign air commerce, in which Florida has no power, in an area where the Federal Government holds the power exclusively, where policy considerations and the power to achieve foreign air transportation goals have been vested by the Congress of the United States in the Federal Government.[13] Pursuant to that power and in order to achieve the international air transportation goals set forth by Congress in section 1102(b) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1502(b), bilateral and multilateral international air transport agreements have been entered into by our Federal Government with other nations for years.[14] The long standing

[13] For the principal provisions of the Federal Aviation Act of 1958 relevant to this case granting such powers, see pages 4–7, *supra*.

[14] President Truman in a message to the Senate submitting the Chicago Convention took note of the fact that international commercial bilateral air transport agreements had been entered into without ratification "under authority vested in me". International Civil Aviation Conference, Message from the President, 79th Cong., 2d sess. 92 Cong. Rec. 6661–6662 (June 11, 1946). The Attorney General, in supporting the President's position on executing bilateral agreements without ratification cited the Constitution plus sections 801, 802 and 1102 of the Civil Aeronautics Act of 1938 as amended, putting the air bilateral agreements in the category of "agreements made pursuant to existing legislation." 40 Op. Att'y Gen. 451 (1948). It is to be noted that one of the agreements involved was the bilateral air

policy of the Federal Government through its bilateral agreements is exemplified by the Nonscheduled Air Services Agreement between the United States and Canada. Appendix H, p. A-48. It seeks to preserve, protect and promote the continued development of a system of air transportation between the U.S. and Canada able to accommodate the transportation needs of their people with a minimum of artificial restraints, free from discriminatory practices, based on the equitable exchange of economic benefits, and exemptions on a reciprocal basis from taxes on the instruments of foreign air commerce, aviation fuel being one such instrument of foreign commerce. That international air transport agreement and the policy it adopts is not novel. It is entirely consistent with the international air transportation policy contained in section 1102(b) of the Federal Aviation Act. There are many international bilateral agreements with reciprocal objectives similar to those of the U.S./Canada Nonscheduled Air Services Agreement including provisions providing for an exemption from taxes on aviation fuel.[15] The

transport agreement between this country and the United Kingdom which has been a keystone for our transatlantic scheduled service operations. See, M. Whiteman 14 *Digest of International Law* 219–221 (1970).

[15] E.g., Art. 7(d) *Aviation Transport Services Agreement*, United States/Colombia, TIAS 5338, 14 UST 432 (Oct. 24, 1956); Art. 7(d) *Air Transport Services Agreement*, United States/Mexico, TIAS 4675, 12 UST 60 (Aug. 15, 1960); Art. 4(c) *Air Transport Services Agreement*, United States/Venezuela, TIAS 2813, 4 UST 1495 (April 13, 1953); Art. 3(b) *Commercial Air Transport Agreement*, United States/Ecuador, TIAS 1606 (Jan. 8, 1947), as amended TIAS 2196, 2 UST 482 (Jan. 3, 10, 1951); Art. 3(2) *Air Transport Services Agreement*, United States/United Kingdom, TIAS 1507 (Feb. 11, 1946); Art. 3(b) *Air Transport Services Agreement*, United States/Chile, TIAS 1905 (May 10, 1947); Sec. F(2,3) *Air Transport Services Agreement*, United States/Argentina, TIAS 8978, 29 UST 2795 (Sept. 22, 1947).

United States has bilateral air transport agreements seeking to achieve the same purposes with over 70 foreign countries. See Appendix J, p. A-82.

The Federal Government pursuant to its continuing policy has been agressive in its efforts to eliminate the imposition of fuel taxes on U.S. air carriers imposed by other nations.[16] Quite naturally, the imposition of such a tax by an individual state of this Nation on the aviation fuel uplift of foreign airlines jeopardizes those efforts. That is a key problem with the Florida fuel tax.

Prior to the enactment of the Florida fuel tax, the U.S. Department of State wrote to Florida's Department of Revenue apprising it of the existing Federal policy to exempt foreign airlines from taxes on aviation fuel and suggested that Florida include an exemption for foreign airlines from the Florida fuel tax in its legislation in order to "insure that U.S. airlines enjoy recriprocal treatment abroad". Appendix J, p. A-83. The State Department letter noted that

> "A few such governments have raised the possibility that state and local authorities in their jurisdictions could impose similar taxes on U.S. airlines. A proliferation of state and local taxes would frustrate the international system of recriprocal tax exemption and thereby significantly increase the cost of international air transportation." Appendix J, p. A-83.

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[16] Civil Aeronautics Board ("CAB"), Fiscal Year ("FY") 1982/1981 Report to Congress at 94–96; CAB, FY 1980 Report to Congress at 84; CAB, FY 1979 Report to Congress at 103; CAB, FY 1978 Report to Congress at 96; CAB, FY 1977 and Transition Quarter Report to Congress at 106–109, 114–115; CAB, FY 1976 Report to Congress at 103–104.

After the Florida fuel tax was enacted, the Department of State again wrote Florida's Department of Revenue warning that "this tax will cause serious foreign relations problems unless provision is made to exclude foreign airlines." Appendix L, p. A-87.

When the Florida passed its legislation taxing aviation fuel used by Appellant and other foreign nationals solely for foreign air commerce purposes, it exceeded its powers and entered a field reserved exclusively to the Federal Government. This Court has stressed repeatedly that:

> "In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Board of Trustees of University of Illinois* v. *United States*, 289 U.S. 48, 59 (1933).

In *United States* v. *Pink*, 315 U.S. 203, 232–233 (1942), this Court held that

> "If state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a State created difficulties with a foreign power. . . .
>
> ". . . No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. . . ."

And in *United States* v. *Belmont*, 301 U.S. 324, 330–331 (1937), this Court stated this principal of exclusivity in these clear terms:

> "Government power over internal affairs is distributed between the national government and the several states. Governmental power over external

affairs is not distributed, but is vested exclusively in the national government. . . .

* * *

". . . In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the state of New York does not exist. . . ."

The acts of the individual state governments of the United States affecting foreign commerce are perceived by foreign nations as if they are the acts of the Federal Government, as if those acts were acts of the National Government even when those state acts are without Federal support and are opposed to Federal foreign policy. *Japan Lines, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 450–451, 453 (1979); *United States* v. *Pink*, 315 U.S. 203, 232–233 (1942); *United States* v. *Belmont*, 301 U.S. 324, 331 (1937); *Board of Trustees of University of Illinois* v. *United States*, 289 US 48, 57 (1933). From the standpoint of foreign nations, a fuel tax on fuel used in foreign commerce by foreign nationals is a national tax, no matter its origins or whether sanctioned by the Federal Government, since in foreign relations the individual states do not exist. *United States* v. *Belmont*, *supra* at 330–331. If a state action involving foreign relations and commerce runs counter to the terms agreed to by the Federal Government through its international agreements and reciprocal arrangements with foreign governments such state action is a virtual breach of the international obligations assumed by the Federal Government from the point of view of the foreign governments involved. The continued effectiveness of the Federal Government in international affairs without exclusive powers in that field would be jeopardized critically.

Congress, through the provisions contained in the Federal Aviation Act of 1958, as amended, has left no area of

foreign air commerce in which any state of the United States may exert any powers. In foreign air commerce and foreign relations affecting foreign air commerce the powers of the Federal Government are exclusive and plenary, and therefore they cannot be interfered with in any way through any form of state action. *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 448 (1979); *United States* v. *Pink*, 315 U.S. 203, 233 (1942); *Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941); *Board of Trustees of University of Illinois* v. *United States*, 289 U.S. 48, 56 (1933). Florida, like the other individual states have no powers in this field:

"The Federal Government, representing as it does the collective interests of the . . . states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties.

'For local interests the several states of the Union exists, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.' Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." Footnote omitted. *Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941).

Florida's enactment of Florida Senate Bill 8A insofar as it taxes the aviation fuel pumped from Florida facilities for use by foreign nationals in foreign air commerce exceeds the powers granted to it under the Constitution of the United States, and therefore, such legislation violates the United States Constitution, not only the Commerce Clause, but the Supremacy Clause as well.

CONCLUSION

For the foregoing reasons, it is earnestly requested that probable jurisdiction be noted.

Respectfully submitted,

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